Office-Supreme Court, U.S.
FILED
JUL 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1967

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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JAGGARS-CHILES-STOVALL, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to comply with the bargaining agent's request for information about earnings of persons performing bargaining unit work.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-25 to A-31) is reported at 639 F.2d 1344. The decision and order of the National Labor Relations Board (Pet. App. A-4 to A-24) are reported at 249 N.L.R.B. 697.

### JURISDICTION

The judgment of the court of appeals was issued on March 19, 1981 (Pet. App. A-32). The petition for a writ of certiorari was filed on May 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) are set forth at Pet. 2.

## STATEMENT

1. Petitioner, a printing firm, has a collective bargaining relationship with the Union [1] covering a unit of its journeymen and apprentices (Pet. App. A-5). The collective bargaining agreement between petitioner and the Union for the period February 21, 1977-June 30, 1981, provides that (1) overtime work shall be compensated at the rate of time-and-a-half for the first four hours, and double time thereafter (G.C. Exh. 2, Art. IV, Sec. 4); [2] (2) "[o]vertime shall be distributed in a fair and equitable manner" (G.C. Exh. 2, Art. VI, Sec. 12); and (3) while foremen may "perform production work to expedite production, [they may] not perform such work to reduce overtime" available to unit members (G.C. Exh. 2, Art. II, Sec. 6; Pet. App. A-6 to A-8). In February 1979, the Union—concerned that these provisions may have been violated—requested petitioner to produce earnings information, including hours worked and gross earnings, for all workers performing unit work, including supervisors (Pet. App. A-7 to A-8). Petitioner refused to provide any earnings information about workers who were not members of the Union. Petitioner contended that promises of confidentiality made to nonunion unit employees and the supervisory status of the foremen and assistant fore-

[1] Dallas Typographical Union No. 173.

[2] "G.C. Exh." refers to the General Counsel's exhibits in the unfair labor practice proceeding.

men who had performed unit work privileged its refusal to supply the requested information (Pet. App. A-10, A-16).

2. Adopting the decision of the administrative law judge, the Board found that petitioner's refusal to furnish the requested information violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. A-15, A-21). The Board rejected petitioner's contention that the information sought was not relevant, finding that the Union needed it to assure conformance with the overtime provisions of the contract (Pet. App. A-7 to A-8, A-15 to A-16). Union spokesman Bates testified that (Pet. App. A-7 to A-8; footnote omitted):

> he decided to press for the nonunion wage information in early 1979 because he knew there were employees who worked on Saturdays and Sundays. Bates said he did not know if they were paid overtime or if at all [*sic*]. He said he was concerned about payment of overtime and that overtime work should be "given out in a fair and equitable manner" in accord with the contract. Bates also stated that he had become concerned about the possibility that an assistant foreman, who could do journeyman work on an hourly basis subject to regulations applicable to journeymen * * *, might be working "in excess."

The Board also rejected petitioner's contention that the nonunion unit employees' earnings information should be kept confidential because, some years earlier, some of those employees had requested that petitioner not give the information to the Union (Pet. App. A-10, A-16). The Board distinguished this

Court's decision in *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), on the ground that "the information sought in that case—aptitude test questions, answer sheets and scores—was far more sensitive than the wage information sought here, and Detroit Edison had [provided] an adequate alternative means of granting the union's request for the information sought" (Pet. App. A-16 to A-17). The Board ordered petitioner, *inter alia*, to "supply the Union with earnings information on all employees doing unit work" (Pet. App. A-17).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-25 to A-31).

The court noted that petitioner no longer challenged the relevancy of the requested wage data as to nonunion unit employees, but contended that it was entitled to honor those employees' confidentiality request, even if the information sought was relevant (Pet. App. A-28). In rejecting petitioner's assertion, the court reaffirmed the established principle that an employer is not privileged to withhold relevant wage data from a union because the employees do not want the union to have that information (*ibid.*). The court considered *Detroit Edison*, *supra*, to be "inapposite," explaining that "[w]age data concerning each employee, here involved, is not akin to the sensitive individualized test-result information, as to which a defense of confidentiality was recognized in *Detroit Edison Co.* * * *" (Pet. App. A-29).

The court also agreed with the Board that the Union had established the relevance of the wage rates of the foremen and assistant foremen who performed unit work (Pet. App. A-31). The court noted that the collective agreement precluded such work from being performed by supervisory personnel if the work

opportunities of unit employees would be limited and agreed that the requested data were needed to police that provision of the contract (Pet. App. A-30 to A-31).

## ARGUMENT

Nothing in the record supports petitioner's apparent assertion (see Pet. i, 3, 6) that the information sought by the Union was not needed to police the collective bargaining agreement. Information as to the number of hours foremen spent performing unit work might have been sufficient to determine whether their work reduced the overtime that otherwise would have been performed by unit employees (see Pet. App. A-8 & nn.10-11; see also Pet. 3, 6).[3] Nevertheless, information limited to the number of hours worked by unit employees and assistant foremen obviously would not indicate whether these individuals were being paid in accordance with the contract.[4] Only the individual earnings data that petitioner refused to disclose could show whether the employees had, in fact, been paid at the rate prescribed in the contract (see G.C. Exh. 2, Art. V, Sec. 1); that information was not reasonably available from any other source.[5]

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[3] Also, information as to the number of overtime hours worked by individual unit employees might have been useful in analyzing the fairness and equity of overtime "distribution."

[4] Although foremen are paid a salary, assistant foremen and unit employees are paid at an hourly rate specified by contract. Contrary to petitioner's suggestion (Pet. 3, 6), at no time did any Union representative indicate that gross earnings information with respect to assistant foremen and all unit employees was unnecessary (Pet. App. A-8).

[5] In addition, information as to actual earnings of individuals would provide confirmation of the amount of overtime

Petitioner refused to provide individual earnings information as to nonunion unit members on the ground that some of those individuals had asked at some point that the information not be disclosed to the Union.[6] Relying primarily on this Court's decision in *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), petitioner argues (Pet. 6-7) that the court of appeals erred in rejecting this contention. In *Detroit Edison*, this Court held that "[i]n light of the sensitive nature of [the] testing information" sought by the Union, "the minimal burden" that the Union would have suffered by accepting the employer's alternative suggestion for compliance with the request for information, "and the total absence of evidence that the [employer] had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities," the employer had not violated "the statutory obligation to bargain in good faith" by refusing to disclose individual test results without the consent of the individual concerned. 440 U.S. at 319-320. *Detroit Edison* provides no support for petitioner's refusal to comply with the Union's request here.

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actually worked and, therefore, was relevant to enforcement of the contract provisions concerning the performance of unit work by foremen and assistant foremen and the distribution of overtime (see Pet. App. A-8).

[6] As to its foremen and assistant foremen, however, petitioner refused to provide the requested information on the grounds that such information was irrelevant to the needs of the Union and that foremen and assistant foremen were not "employees." The court of appeals correctly rejected the claim (Pet. App. A-30 to A-31), and petitioner does not challenge that holding in this Court.

First, in *Detroit Edison* the Court did not purport to establish any general "confidentiality" exception to an employer's obligation to disclose relevant information to a Union. Throughout the opinion for the Court in *Detroit Edison* the "sensitive" nature of individual test scores was emphasized. See 440 U.S. at 306-307 & n.6, 315, 316-317, 318-319 n.16. As the court of appeals correctly concluded (Pet. App. A-29), particularly where, as here, wage rates are set by contract, gross earnings information "is not akin to the sensitive individualized test-result information" at issue in *Detroit Edison*. Second, petitioner made no offer to provide the requested information in any form sufficient to satisfy the Union's needs. Third, petitioner's purported concern about the confidentiality of the individual earnings of employees is somewhat contradicted by its assertion (Pet. 4) that it "was not unwilling to provide [information as to] * * * the amount of overtime worked by each employee * * *"—which is tantamount to disclosing what the employee should have been paid under the contract.

Nor is the holding of the court of appeals in this case inconsistent with the decision of any other court of appeals. The courts have consistently rejected the contention that the asserted confidentiality of wage data justifies an employer's refusal to disclose that information to a union. See, *e.g.*, *General Electric Co.* v. *NLRB*, 466 F.2d 1177, 1185 (6th Cir. 1972); *NLRB* v. *Frontier Homes Corp.*, 371 F.2d 974, 978-979 (8th Cir. 1967); *Curtiss-Wright Corp.* v. *NLRB*, 347 F.2d 61, 71 (3d Cir. 1965); *Utica Observer-Dispatch, Inc.* v. *NLRB*, 229 F.2d 575, 576 (2d Cir. 1956); *NLRB* v. *Item Co.*, 220 F.2d 956, 959 (5th Cir. 1955); *Aluminum Ore Co.* v. *NLRB*, 131 F.2d

485, 487 (7th Cir. 1942); see generally *Boston Herald-Traveler Corp.* v. *NLRB*, 223 F.2d 58 (1st Cir. 1955).[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1981

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[7] *Emeryville Research Center* v. *NLRB*, 441 F.2d 880 (9th Cir. 1971), is not to the contrary. There the court simply held that when an employer raised specific objections to the form in which the information was requested and offered to provide the information in mutually satisfactory form, but the union failed to cooperate in the effort to determine a mutually satisfactory form, there was no violation of federal labor law. As noted above, however, petitioner simply refused to provide the information and made no attempt to seek a mutually acceptable manner of proceeding.

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